

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

APOTEX, INC.,

Plaintiff,

v.

CEPHALON, INC., et al.,

Defendants.

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CIVIL ACTION

No. 2:06-cv-2768

ORDER

AND NOW, this 9th day of April, 2012, upon consideration of Apotex, Inc.'s "Motion to Declare This an Exceptional Case and For Attorneys' Fees and Expenses Pursuant To 35 U.S.C. § 285 and FRCP 54(d)(2)" (Doc. No. 518), and the response thereto, the Court finds that it is appropriate to defer consideration of Apotex's entitlement to attorneys' fees and costs until resolution of any appeal of the Court's judgment on both the infringement and invalidity trials.

Federal Rule of Civil Procedure 54(d) permits the Court to defer consideration of the issue of attorneys' fees until appeals are complete. FED.R.CIV.P. 54(d)(2)(b), 1993 advisory committee notes. Apotex claims entitlement to attorneys' fees under 35 U.S.C. § 285, which permits an award of fees only in "exceptional cases." Whether this case is "exceptional" depends substantially upon the Court's judgment that the patent at issue is invalid and unenforceable, a determination that Cephalon intends to challenge on appeal. "Given that this Court's determination of whether this is an exceptional case will depend, in part, on the outcome of the appeal that is likely in this case, it is within the Court's discretion to stay the issue of attorneys' fees until such appeals are complete." AstraZeneca AB v. Mutual Pharmaceutical Co., Inc., 2003 WL 22794868, *2 (E.D.Pa. Sept. 19, 2000) (citing Pharmacia

& Upjohn Co. v. Mylan Pharms., Inc., 182 F.3d 1356, 1360 n. 2 (Fed. Cir., 1999).

THEREFORE, it is hereby **ORDERED** that Apotex's motion is **DENIED without prejudice**. Apotex may re-file this motion upon resolution of any appeal of the Court's judgment on Counts I, II, III and V of Apotex's Second Amended Complaint.

BY THE COURT:

/s/ **Mitchell S. Goldberg**

Mitchell S. Goldberg, J.